

VISION QUEST 2015
PHASE ONE: LANDSCAPE ASSESSMENT
POLICY ANALYSIS & RECOMMENDATIONS FOR THE STATE OF MAINE
Prepared by: Lisa A. Mills, PhD

**Part I. Discussion of Recent Federal Policy
Developments/Guidance/Legal Changes that Foster Opportunities for
Advancing State Employment 1st Initiatives through Medicaid Home and
Community Based Services**

Recent federal policy guidance, regulatory changes and legal interpretations of states obligations under the Americans with Disabilities Act have led to a need to ensure integrated employment services are readily available and facility-based services are only used when they are determined to be the most integrated setting in which an individual's support needs can be effectively met. The following provides an overview of all of the recent developments and trends that states should be aware of in moving forward with Vision Quest work.

During the past twenty years, trends in federal legislation, regulation, and litigation, along with state policy-making have been creating a new environment with different expectations and rules for the provision of employment and day services for people with disabilities. At the same time, the general public is becoming more aware of the issues as local and national media are covering this topic more than in the past.

The issue that has received the most media attention is the payment of less than minimum wage to people with significant disabilities. Although this practice is legal under Section 14(c) of the Fair Labor Standards Act, enacted in 1938, much of the recent public discourse has been around the need for reform or phase out of this law that currently impacts about 400,000 individuals with disabilities across the country.

Within the federal government, the focus has been on addressing segregation and congregation of individuals with disabilities in the employment and day service models and programs that are typically used. There has been an increased focus on supporting people with disabilities in jobs in integrated community settings that pay competitive wages and offer opportunities for career advancement. With this has come a focus on integrated daytime supports that can “wrap around” integrated employment opportunities.

It's also important to note that Congress is becoming more focused on strategies for improving the integrated, gainful employment of people with disabilities, and Members of Congress are becoming more educated on the issues (costs, research and best practices) related to the provision of publicly funded employment and day services.

LAWS / COURT CASES / ENFORCEMENT / LITIGATION

Olmstead v. L.C. – 1999

The Supreme Court’s 1999 decision in *Olmstead v. L.C.* (Lois Curtis) affirms Title II of the ADA and prohibits unnecessary segregation of people with disabilities and requires that people with disabilities receive services in the “most integrated setting” appropriate to their needs. The *Olmstead* case has driven the movement of people with disabilities out of institutions and into community-based living situations. The emphasis is now shifting to include the expectation that employment and day services also be delivered in the most integrated setting where a person’s needs can be met.

The ADA “integration mandate” is administered by the Civil Rights Division of the U.S. Department of Justice and states: “A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” (28CFR section 35.130(D))

Federal Administration Efforts around *Olmstead* Enforcement – 2009-2015

In 2009, the tenth anniversary of the *Olmstead* decision, the Obama administration committed to a federal focus on enforcing the ruling. This has led to efforts by the US Departments of Justice, Health and Human Services, Housing and Urban Development, Labor, and others.¹

US Department of Justice Efforts

In July of 2011, the US Department of Justice issued a Statement and technical assistance guide detailing public entities (e.g. states; counties; school districts) obligations with regard to the integration mandate in Title II of the Americans with Disabilities Act and the *Olmstead* decision.² In this Statement, the US Department of Justice explained the applicability of the integration mandate to publicly funded employment and day services, saying:

“Segregated settings include, but are not limited to...congregate settings populated exclusively or primarily with individuals with disabilities [and] settings that provide for daytime activities primarily with other individuals with disabilities.” States are

¹ <http://www.whitehouse.gov/the-press-office/2012/06/22/anniversary-olmstead-obama-administration-reaffirms-commitment-assist-am>

² http://www.ada.gov/olmstead/q&a_olmstead.htm

required to have “a comprehensive, effectively working Olmstead plan [which] must do more than provide vague assurances of future integrated options or describe the entity’s general history of increased funding for community services and decreased institutional populations. Instead, it must...contain concrete and reliable commitments to expand integrated opportunities. The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars. The plan should include commitments for each group of persons who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, **or individuals spending their days in sheltered workshops or segregated day programs.** To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan.” [Emphasis added]

The Statement also addressed choice and put more emphasis on public entities positively promoting integrated services and proactively addressing the concerns or hesitations of individuals with disabilities and their guardians in order to ensure the use of integrated services, saying:

“Individuals must be provided the opportunity to make an informed decision. Individuals who have been...segregated have often been repeatedly told that they are not capable of [receiving services in the community] and have been given very little information, if any, about how they could successfully [receive services] in integrated settings. As a result, individuals’ and their families’ initial response when offered integrated options may be reluctance or hesitancy. Public entities must take affirmative steps...**to ensure that individuals have an opportunity to make an “informed choice”**. Such steps include providing information about the benefits of integrated settings; facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their families, and with community providers. Public entities also must make reasonable efforts to identify and addresses any concerns or objections raised by the individual or another relevant decision-maker.”

The Statement also clarified the range of ways a public entity could be out of compliance with the ADA’s integration mandate, saying:

“A public entity may violate the ADA’s integration mandate when it: (1) directly or indirectly operates facilities and or/programs that segregate individuals with disabilities; (2) finances the segregation of individuals with disabilities in private facilities; and/or (3) through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private

facilities or programs.”

As of late 2012, in an effort to continue enforcement of the ADA and Olmstead, the Department of Justice (DOJ) had been involved in more than 40 Olmstead matters in 25 states. Recent examples include settlement agreements, litigation, and letters of findings in states such as Virginia, Oregon and Rhode Island.

Settlement Agreement between U.S. Department of Justice (DOJ) and Virginia – 2012

In January 2012, the Commonwealth of Virginia and the DOJ negotiated a settlement agreement regarding claims that Virginia failed to serve individuals with intellectual/developmental disabilities (I/DD) in the most integrated settings appropriate, in violation of the Americans with Disabilities Act (ADA) and the Supreme Court’s Olmstead decision. The agreement confirms that the priority service option should be individual supported employment in integrated work settings. The Agreement requires the Commonwealth to develop and implement an "Employment First" policy to prioritize and expand meaningful work opportunities for individuals with developmental disabilities.³

Oregon Lawsuit (Lane v. Kitzhaber) and US Department of Justice Involvement

On January 25, 2012 the Oregon designated protection and advocacy agency for people with disabilities (Disability Rights Oregon) filed a lawsuit in federal court on behalf of eight self-advocates seeking integrated employment and asserting that individuals with disabilities are unnecessarily segregated in sheltered workshops and do not have the opportunity to work and receive employment services in integrated settings.⁴ The case has since been certified as a class action.

Oregon state attorneys petitioned to have the case dismissed, saying the integration mandate does not apply to employment services. In May 2012, the federal court hearing the case ruled against the state of Oregon, asserting that the Olmstead integration mandate applies to employment, as well as housing. In March 2013, the US Department of Justice joined as a plaintiff in the lawsuit. The DOJ conducted its own investigation and concluded that Oregon has unnecessarily segregated people with intellectual and developmental disabilities in “sheltered workshops.”⁵

³ http://www.ada.gov/olmstead/documents/virginia_settlement.pdf

⁴ <http://www.droregon.org/results/results-documents/Lane%20v.%20Kitzhaber-Fact%20Sheet.pdf/view>

⁵ http://www.ada.gov/olmstead/documents/oregon_findings_letter.doc

In April 2013, the Governor of Oregon issued an Executive Order⁶ addressing the state's plan for transforming employment services for individuals with intellectual and developmental disabilities, "including a significant reduction over time in state support of sheltered work and an increased investment in supported employment services." The order sets a presumption that all individuals served by the Office of Developmental Disability Services (ODDS) and the Office of Vocational Rehabilitation Services (OVRs) are capable of working in integrated settings. The order establishes a policy of no new entrants to facility-based prevocational services as of July 1, 2015. By July 1, 2022, ODDS and OVRs are expected to provide community-based employment services to at least 2,000 people. Targets have been set to move individuals into community employment—50 in 2014, increasing to an additional 275 per year by 2017.

The state released a new Executive Order early in 2015. The new Executive Order addresses, at a policy level, some of the major issues in the lawsuit. The new Executive Order replaces the goal of "employment in integrated settings" (which previously included work crews and enclaves and jobs paying less than minimum wage) with "competitive, integrated employment" which is fully defined consistent with the Rehabilitation Act. Additionally, Small Group Supported Employment is now defined separately. The Order makes it clear that this form of employment is not competitive and integrated. Changes further require wages for Small Group Supported Employment to be at least minimum wage and participants must have a goal to achieve competitive integrated employment. For the full text of the new Executive Order, see:

http://www.oregon.gov/gov/Documents/executive_orders/eo_15_01.pdf

On September 8, 2015 The U.S. Justice Department announced that it had entered into a proposed settlement agreement with the state of Oregon that will resolve violations of the Americans with Disabilities Act (ADA) and will impact approximately 7,000 Oregonians with intellectual and developmental disabilities (I/DD) who can and want to work in typical employment settings in the community.⁷ As a result of the proposed settlement, which is due to be approved by the court in December of 2015, over the next seven years, 1,115 working-age adults with I/DD who are currently being served in segregated sheltered workshops will have opportunities to work in real jobs at competitive wages. Additionally, at least 4,900 youth ages 14 to 24 years old will receive supported employment services designed to assist them to choose, prepare for, get and keep work in a typical work setting. Half of the youth who receive employment services will receive, at a minimum, an individual plan for employment through the state's Office of Vocational Rehabilitation Services.

Department of Justice's Rhode Island Investigation and Settlement - 2014

⁶ http://www.oregon.gov/gov/docs/executive_orders/eo_13-04.pdf

⁷ <http://www.justice.gov/opa/pr/justice-department-reaches-proposed-ada-settlement-agreement-oregons-developmental>

On January 6, 2014, the US DOJ issued a Letter of Findings on its investigation of the state of Rhode Island’s system of providing employment, vocational, and day services to individuals with intellectual and developmental disabilities. DOJ found that Rhode Island did not comply with the Americans with Disabilities Act (ADA) and the Olmstead ruling requirements that services be provided in the most integrated setting appropriate to the needs of people with disabilities. Specifically, Rhode Island failed to provide opportunities and supports to individuals in sheltered workshops and facility-based day programs to receive services in integrated settings and to work in integrated, community employment.

The US DOJ’s findings included⁸:

- Rhode Island’s sheltered workshops and facility-based day programs are segregated settings. They function like most institutional settings, for reasons including isolation from non-disabled peers, the nature of the settings, and lengthy placements.
- Few individuals in Rhode Island with I/DD can access services that would enable them to work or participate in activities in the community. Most are served in sheltered workshops and facility-based day programs. This constitutes an over-reliance on segregated settings, and a violation of civil rights.
- Many people in Rhode Island’s sheltered workshops and facility-based day programs could be served in integrated work and day settings. DOJ’s expert found “that very few, if any, of the individuals that she observed in sheltered workshops and day programs could not work in competitive employment.”
- The state lacks the capacity to provide services in community settings for all people who are interested in them. Service recipients are not receiving information about their options, and there is a lack of resources, including job coaches, job developers, behavioral supports, and transportation. Individuals with the most severe disabilities have been screened out of supported employment and directed to day services, even if they want to work.
- Students with I/DD transitioning out of school are not being presented with community-based alternatives, and are receiving very limited transition services—this puts them at risk of placement in segregated settings.
- DOJ found that Rhode Island could redirect the funds that support facility-based day and employment programs to provide transition, employment, and day services in integrated settings.

In early April 2014, a settlement was reached and a Consent Decree between the state of Rhode Island and the U.S. Department of Justice (DOJ) was released.⁹ This court-approved

⁸ http://www.ada.gov/olmstead/documents/ri_lof.pdf

⁹ <http://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>

agreement between the state and the US DOJ applies to individuals in facility-based sheltered workshops and day programs, as well as transition-aged youth. Although the Consent Decree is not legally binding on other states, it is an indication of what the US DOJ believes all states must do to address over-reliance on sheltered workshops and facility-based day services and to ensure the provision of publicly funded employment and day services in the most integrated setting.

Important Features of the Consent Decree:

- The central issue is increasing integration, with the goal of making sure that individuals with disabilities have the same access to activities (employment, leisure, and daily life) as their non-disabled peers.
- Over the next ten years, many people served in facility-based programs (both prevocational and day services) in Rhode Island are expected to move into community-based services, mainly supported employment and integrated day services.
- The state intends to fund this increase in community-based services by reallocating resources currently expended on sheltered workshop programs and segregated day programs, as individuals with disabilities transition out of these service models.
- The Consent Decree establishes that, in Rhode Island, people in supported employment are also entitled to community-based integrated day services as a complement or “wrap-around” to that employment.
- The Consent Decree also establishes a 40-hour week as the norm. In Rhode Island, it appears that individuals are entitled to integrated services for up to 40 hours per week. The goal is to achieve an average of 20 hours per week of supported employment across all individuals served.
- Individuals can seek a variance to stay in facility-based services but only if they try integrated employment services first, including a community-based supported employment assessment, work incentives benefits counseling and a trial work experience in the community.

Center for Medicare and Medicaid Services (CMS)

The Centers for Medicare and Medicaid Services (CMS) administer the federal-state Medicaid program and addresses sections of Medicaid law under which states can use federal matching funds to pay for home and community-based services (HCBS) either through a variety of waivers or State Plan services. These services include day habilitation, pre-vocational services, and supported employment among other services

Guidance on Employment for Individuals in Medicaid Home and Community-Based

Waiver Programs – September 2011

In September 2011, CMS released new guidance regarding employment services in HCBS waiver programs.¹⁰ The guidance “highlights the opportunities available to use waiver supports to increase employment opportunities for individuals with disabilities within current policy” and “highlights the importance of competitive work for people with and without disabilities and CMS’s goal to promote integrated employment options through the waiver program.” CMS updated its core service definitions and added a new service – Career Planning – that states could choose to include in their waivers. The most notable changes were made to the core service definition for prevocational services, particularly with regard to the expected outcome of the service being transition to employment and optimally integrated competitive employment. In the cover memo, CMS emphasized that pre-vocational services are not an end point, but a time limited service for the purpose of helping someone obtain competitive employment. States are now also expected to separate Supported Employment into two separate definitions: Supported Employment-Individual and Supported Employment-Small Group. Small Group services are expected to lead to transition to integrated individualized competitive employment. The guidance also included four very important statements with regard to supported employment services and reimbursement strategies for these services:

- Supported employment and prevocational services may be furnished as expanded habilitation services under the provisions of §1915(c)(5)(C) of the Act. They may be offered to any target group for whom the provision of these services would be beneficial in helping them to realize their goals of obtaining and maintaining community employment in the most integrated setting. The provision of these services is not limited to waiver participants with intellectual or developmental disabilities, and can be a meaningful addition to the service array for any of the regulatorily identified target groups.
- Individuals who receive a particular day or employment service under a Medicaid waiver may also receive other day and employment services. A participant’s person-centered services and supports plan may include two or more types of these non-residential habilitation services. However, different types of non-residential habilitation services may not be billed during the same period of the day (e.g. the same hour).
- Statewide rate setting methodologies, which are further described in I-2-a of the waiver application may be used to embrace new models of support that help a person obtain and maintain integrated employment in the community. These may include co-worker support models, payments for work milestones, such as length of time on the job, number of hours the participant works, etc. Payments for work milestones are not incentive payments that are made to an employer to encourage or subsidize the employer’s hiring an individual with disabilities, which is not permissible.

¹⁰ <http://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf>

- Ticket to Work Outcome and Milestone payments do not conflict with CMS regulatory requirements and do not constitute an overpayment of Federal dollars for services provided since payments are made for an outcome, rather than for a Medicaid service rendered. Ticket to Work Outcome and Milestone payments are not in conflict with payments for Medicaid services rendered.¹¹

Since September 2011, states renewing or creating HCBS waivers have been required to follow this guidance if their waivers include prevocational services.

Final Rule on Home and Community-Based Services – January 2014

In January 2014, CMS released the Final Rule on Home and Community-Based Services (HCBS), effective 3/17/14. This came after a five year rule-making process that included two public comment periods through which CMS received over 2,000 comments on the proposed rules. The intent is to ensure that individuals receiving HCBS under Medicaid “have full access to the benefits of community living and the opportunity to receive services in the most integrated setting appropriate.”¹² The central principle is that people with disabilities should have the same access to the community as individuals without disabilities. The use of Medicaid HCBS funds for services in settings not considered “integrated” are prohibited under the new rule. The rule also establishes new requirements for person-centered planning, documentation of informed choice and the provision of independent, conflict of interest free case management (with potential exceptions for very small communities).

In this rule, settings are home and community-based if they allow individuals independence, control of daily routines, privacy, and community integration.¹³ Specifically, the CMS Final Rule calls out five required qualities of HCBS settings that states will have to meet in order to qualify for HCBS funding:

- 1) “The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, **including opportunities to seek employment and work in competitive integrated settings**, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS [emphasis added];
- 2) The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service

¹¹ See State Medicaid Director letter SMD# 10-002 at <http://www.cms.gov/SMDL/SMD/list.asp>

¹² <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

¹³ <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Final-Rule-Slides-01292014.pdf>

plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board;

- 3) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint;
- 4) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact; and
- 5) Facilitates individual choice regarding services and supports and who provides them."

Settings that are presumed not to be home and community-based will be subject to additional scrutiny. They are: settings in facilities providing inpatient treatment, settings on grounds of or next to a public institution, and "settings with the effect of isolating individuals from the broader community of individuals not receiving Medicaid HCBS."¹⁴ In a supplementary guidance document¹⁵, CMS explains that "settings that isolate people receiving HCBS from the broader community may have any of the following characteristics:

- The setting is designed to provide people with disabilities multiple types of services and activities on-site.
- People in the setting have limited, if any, interaction with the broader community.
- Settings that use/authorize interventions/restrictions that are used in institutional settings or are deemed unacceptable in Medicaid institutional settings (e.g. seclusion).

States have the option to eliminate settings they conclude do not meet the standards in the new rule or they can propose a plan to bring these settings into compliance with the new rule. States may take up to five years to transition. In December, 2014 CMS issued additional guidance applicable to non-residential settings in the form of exploratory questions.¹⁶

Option to Permanently Close New Admissions to Settings that Only Minimally Achieve Compliance while not Eliminating the Setting Entirely

On June 26, 2015, CMS released additional guidance to states.¹⁷ In this guidance, CMS addressed settings that may currently exist but that states determine can only minimally

¹⁴ Ibid.

¹⁵ <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Settings-that-isolate.pdf>

¹⁶ <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/exploratory-questions-non-residential.pdf>

¹⁷ <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/home-and-community-based-setting-requirements.pdf>

meet the settings standards both in the short and long-term. CMS makes it clear that states have the option, to permanently stop new admissions to certain HCBS settings, while allowing these settings to continue - for those currently receiving services the settings - until use of the settings sunsets naturally due to attrition. CMS states:

“In addition, using their transition plan, a state may establish that certain settings currently in use in a home and community-based services waiver may continue within the waiver, as long as they will be able to meet the minimum standard set in the rule on or before the end of the transition period, but the state may suspend admission to the setting or suspend new provider approval or authorizations for those settings. Simultaneously, the state may establish or promote new or existing models of service that more fully meet the state’s standards for home and community-based services. This arrangement, though established through the transition plan, may continue beyond the transition period. In this arrangement, all settings must meet the minimum standards established by CMS for home and community-based settings, but the state may identify a tiered standard so that only those meeting the optimal standards established by the state will be developed in the future.” [Page 11]

This is the first time states have the option to restrict access (sometimes called “closing the front door”) to particular types of settings offered under an HCBS program in order to ensure that future growth and expansion of HCBS does not occur in these settings. Previously, states that wished to do this would have had to simultaneously submit a plan to completely phase out use of those settings during some specified period of time. States previously were required to transition individuals - currently receiving services in those settings - to other settings if they wished to stop all new admissions to those settings. Otherwise, the state would be in violation of Medicaid rules by not permitting equal access to all waiver participants (sometimes referred to as “operating a waiver within a waiver”). This new option for states is only available during the transition period for states to come into compliance with the new HCBS settings standards (through March, 2019). States must include their intent to use this option in their Statewide Transition Plan. However, this represents the greatest opportunity phase out the use of segregated employment and non-work service settings, while not inviting significant opposition from individuals (and their families/guardians) already receiving services in those settings because those individuals’ access to those settings would not be impacted. For states that currently have heavy investment in segregated employment and non-work settings, this offers a significant opportunity to address the system inertia that has led to continued use of these settings, even when a state does not actively intend this and instead prefers to increase the use of integrated settings.

CMS Guidance Permitting Outcome-Based Incentives and Reimbursement Models for

Supported Employment Services Provided Under 1915c Waivers

On September 3, 2015, CMS officials made a presentation at the annual HCBS Conference announcing CMS guidance and ability to approve use of outcome-based incentive payments and outcome-based reimbursement models for Supported Employment Services including the ability to reimburse for supported employment job coaching based on hours worked by the supported employee.¹⁸ In essence, the option allows states to pay for employment outcomes based on a data-based average amount of time expected to take to complete the service (based on actual data) and the cost per hour of service determined by the state.

CMS would accept a payment structure that includes outcome payments for Discovery or Supported Employment Assessment Service and Report, or Job Development, Placement, Customized Employment Position, as a single unit of service as long as the service is time-limited, has a defined tangible outcome (such as a report or career plan in the first instance, or an actual job in the second). The state must articulate a rate for the service, then use data to develop an estimate of the average amount of service time needed to achieve the outcome. The outcome payment would then be based on the rate times the estimated number of hours. Under this structure, states can also make milestone payments in addition to fee-for-service to reimburse providers when certain employment outcomes are achieved. Payment must be based on fair estimate of effort (based on data) a provider must put in to produce these “above average” outcomes. CMS would also approve a plan to pay per hour worked by the supported employee as long as such payment is based on average percentage of job coaching time necessary to enable a person to retain employment (supported by data at outset and verified at intervals on an on-going basis).

CMS also said they would accept tiered outcome payments based on an assessment of an individual’s level of disability. The state must explain in their waiver application or amendment the number of tiers and how the state will determine the appropriate tier for each waiver participant. If a state doesn’t use tiers and instead has one reimbursement rate for everyone, CMS will ask if the state can demonstrate that people at all levels of acuity are getting access to the service and using the service to the same degree.

These payment options, CMS, said, “require fiscal integrity structures that ensure a regular look behind at actual hours spent working with individuals to ensure that the estimates used to set payments remain accurate.” CMS would not accept payment for a unit “where there is no expectation that any amount of service will be delivered by the job coach.” CMS also requires that any structure that involves paying per hour worked by the supported employee must expect fading of paid supports over time, since CMS expects that the longer an individual is in a job, the fewer supports they will need to maintain employment. In addition, payment adjustment is required when a job coach works with multiple

18

http://www.leadcenter.org/system/files/resource/downloadable_version/LEAD_Center_Policy_Update_9.25.15.pdf

individuals in a job site. In the presentation at the HCBS conference, CMS officials stated that this was to avoid incentivizing congregate work arrangements. CMS will also require that there is no organizational or financial relationship between the job coach and the person centered care planner/case manager. CMS has indicated that an Informational Bulletin containing this guidance will be released by December, 2015.

CMS imposes Special Terms and Conditions on New York State's Waiver Renewal:

In April of 2013, after months of negotiations between the State of New York and CMS regarding the lack of integrated employment services and the huge costs of its 1915 (c) HCBS waiver for individuals with developmental disabilities, CMS and New York agreed to a set of special terms and conditions for the continued receipt of federal matching funds. The document states that “the receipt of expenditure authority for transformation for 4/1/13 – 3/31/14 is contingent on the state’s compliance and CMS’ receipt of the following;

- Provide the number of people receiving supported employment services and in competitive employment for the period of May 1, 2012 – April 30, 2013;
- Increase that number by 700 people with no exceptions for attrition, and
- Increase that number by 250 persons by October 1, 2013
- End new admissions to sheltered workshops as of July 1, 2013 and reporting quarterly enrollment in sheltered workshops;
- Submitting a final plan by January 1, 2014, to CMS that includes a timeline for closing sheltered workshops and transformation to competitive employment;
- Develop a detailed work plan for the number of students exiting the education system moving directly into competitive employment; and,
- The plan must include a timeline for closing sheltered workshops, and a description of the collaborative work with the New York educational system for training/education to key stakeholders on the availability and importance of competitive employment.

U.S. Department of Education

Individuals with Disabilities Education Act (IDEA) Transition Amendments:

The purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education,

employment, and independent living.” (20 U.S.C. 1400(d)(1)(A).

In 2004, the U.S. Congress amended IDEA and its transition sections as follows:

“The term ‘transition services’ means a coordinated set of activity for a child with a disability that:

- Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including...postsecondary education, vocational education, integrated employment (including supported employment) continuing and adult education, adult services, independent living, or community participation;
- Is based on the individual child’s needs, taking into account the child’s strengths, preferences and interests; and,
- Includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living and functional vocational evaluation.”

In January 2012, in response to a letter of inquiry from Wisconsin’s Protection & Advocacy agency (Disability Rights Wisconsin) regarding the application of the “least restrictive environment” (LRE) to transition IEPs, Melody Musgrove, Ed.D, Director of the Office of Special Education Programs, responded that work placement can be an appropriate transition service and, if determined appropriate by the team, such placements must be included in the IEP. Her letter continued by stating that all placements, including those related to transition services (including work or employment training placements) must be in the least restrictive environment as determined by the IEP team.

Rehabilitation Act (Federal law governing provision of vocational rehabilitation services):

The 1992 Congressional amendments to the Rehabilitation Act of 1973 laid the groundwork for changed expectations for individuals with significant disabilities by eliminating a historical requirement that an individual applying for state V.R. services had to be determined “feasible” to engage in substantial gainful activity (SGA) after the provision of rehabilitation services. This criterion was replaced with a statutory

“presumption of employability” in integrated settings for all individuals with disabilities, including individuals with the most severe disabilities.

The law and subsequent regulations required that V.R. agencies presume every applicant can benefit from V.R. services and successfully achieve employment. An applicant now can only be denied services by the state V.R. agency if the agency can demonstrate “clear and convincing” evidence that an individual is incapable of benefiting from VR services due to the severity of the individual’s disability. The regulations require the use of multiple work trials over a sufficient period of time and with appropriate supports so that an individual’s ability to benefit has maximum chance to be recognized.

In 2001, RSA issued a regulation clarifying that successful employment outcomes are those in the integrated labor market, including supported and self-employment, and consistent with the individual’s strengths, resources, priorities, concerns, abilities, capabilities, interests and informed choice [34CFR361.5(b)1]. Within this regulation, RSA stated that placements in sheltered workshops or other segregated settings would no longer be counted as a successful placement by state V.R. agencies.

Further emphasis on the presumption of employment was recently provided by the Rehabilitation Services Administration (RSA) in Technical Assistance Circular (TAC) 14-03 on May 6, 2014. This Circular addresses transition-age youth with disabilities including those with the most significant disabilities. The TAC states: “ ‘Clear and convincing evidence’ is defined, in part, as the highest standard in our civil system of law whereby V.R. agencies must have a high degree of certainty before concluding that an individual is incapable of benefiting from services and successfully achieving integrated employment. The term ‘clear’ means unequivocal.”

State Actions to Avoid US Department of Justice Involvement or Problems with Continued CMS Approval to Operate Medicaid Home and Community-Based Services

Massachusetts Blueprint – November 2013

The November 2013 “Blueprint for Success: Employing Individuals with Intellectual Disabilities in Massachusetts” (Massachusetts Blueprint) was the result of a collaborative process initiated by Commissioner of the Massachusetts Department of Developmental

Services with the Association of Developmental Disabilities Providers, and the Arc of Massachusetts. The Plan phases out the use of prevocational services in sheltered workshops and replaces these services with supported employment and integrated day services provided in community settings. It is described as a plan to re-design day and employment services to better respond to the needs of individuals with I/DD and their families, as well as to expand the principles of the Olmstead decision to day and employment settings.¹⁹

As part of the plan, new referrals to workshops were stopped as of 1/1/14. Everyone currently in workshops will be transitioned “into individual supported employment, group supported employment, and/or Community-Based Day Services (CBDS) programs. The plan makes a commitment to no reduction in service hours to individuals and their families. The plan includes extensive technical assistance for service providers.²⁰

In July of 2013, Massachusetts implemented new rates to incentivize integrated employment services and outcomes. The Blueprint identifies the need for an additional \$26.7 million over fiscal years 2015-2018, to successfully complete the transition the 2,600 individuals out of the workshops and into community-based employment and day services. With federal match funding, the net cost to the state of Massachusetts would be \$13 million over the four years. The recently adopted Massachusetts budget for FY 2015 includes \$ 3 million of new state funding to begin the first year of the Blueprint.

Maryland State Use Program Ceases Contracts with Sheltered Workshops – July 2014

In light of the changing nature of what constitutes appropriate and acceptable employment services for people with disabilities, Maryland Works is phasing out assignment of Employment Works Program (State Use) contracts for completion in sheltered workshops. Any new contract which will be completed in a sheltered workshop will have an end-date of June 30, 2015; and all current EWP contracts tied to sheltered workshops will be discontinued on June 30, 2015.

The Maryland agency said that events of the past few years have given them greater clarity as to what is and is not acceptable in services provided for people with disabilities. According to their executive director, “It is abundantly clear that, when it comes to employment related services, sheltered workshop services are no longer acceptable as anything other than a last resort; and, even that use of sheltered workshop services is highly questionable and out of favor.” The Maryland Works' board of directors has set a deadline of June 30, 2015 for discontinuation of EWP contracts being assigned for completion in sheltered workshops. That said, there are a wide range of options available to EWP provider vendors for transition out of sheltered workshop services and into other models of service which meet the current and emerging standards for employment

¹⁹ Massachusetts Blueprint, November 2013, p. 3. <http://www.mass.gov/eohhs/docs/dmr/blueprint-for-success.pdf>

²⁰ Massachusetts Blueprint, November 2013.

services for people with disabilities. A couple of examples include conversion of a sheltered workshop to a free standing employee-owned company, or forming a partnership with an individual-with-disability-owned business. Maryland Works will schedule work sessions to provide technical assistance to EWP provider-vendors on the options available to them in phasing out their sheltered workshops.

Actions by President Obama and Congress

President Obama's Executive Order – February 2014

In February 2014, President Obama issued an Executive Order raising the minimum wage to \$10.10 for federal service and concession contract workers. This applies to new contracts and replacements for expiring contracts as of January 1, 2015. The White House has made it clear that workers with disabilities working under service or concessions contracts with the federal government will be covered by the same \$10.10 per hour minimum wage protections regardless of their time-studied productivity.²¹

The Workforce Innovation and Opportunity Act – July, 2014

This bill reauthorizes the national workforce investment system and the vocational rehabilitation program through 2020. Many changes designed to help youth and adults with disabilities access employment, education, job training and support services, have been made including:

- Establishing a much larger role for public vocational rehabilitation (VR) as youth with disabilities make the transition from school to adult life. 15% of public VR funds must now be used for transition services, specifically pre-employment transitions services that include job exploration counseling, work-based learning experiences, counseling on post-secondary opportunities, workplace readiness training, and training on self-advocacy. Each local VR office must also undertake pre-employment transition coordination activities and they must involve schools and workforce development system in these activities.
- Focusing supported employment state grants to VR agencies on youth. Half the money the state receives under these grants will now have to be used to support youth up to age 24 with the most significant disabilities to achieve supported competitive integrated employment. It's important to note that state VR agencies can use their general VR funds (\$3 billion allocated nationally as of 2014) to fund supported employment cases for any eligible individual with a disability, so there should be no reduction in access to these services for adults aged 25 or older who need them.

²¹ White House press release, "Fact Sheet – Opportunity for All: Rewarding Hard Work," 2/12/14.

- VR may now provide extended supported employment services for up to 24 months (previously the limit was 18 months).
- Limiting the use of sub-minimum wage. Section 511 is specifically intended to reduce the number of transition-age youth entering sheltered workshops and working for sub-minimum wage. The emphasis is on moving young people with significant disabilities into integrated community employment. The bill prohibits individuals with disabilities age 24 and younger from working in jobs paying less than the federal minimum of \$7.25 per hour unless they first apply for and receive vocational rehabilitation services, among other requirements. There are exceptions but only for those already working for subminimum wage and cases where individuals may be deemed ineligible for vocational rehabilitation services. Section 511 also prohibits schools from contracting for services, training or work experiences that involve the use of sub-minimum wage.
- Requiring state VR agencies to have formal agreements with the state Medicaid systems, and the state intellectual and developmental disability (IDD) agency.
- Adding a definition of “customized employment” in federal statute, and an updated definition of “supported employment” that includes customized employment.
- Adding a definition for “competitive integrated employment” as an optimal outcome.
- Enhancing roles and requirements for the general workforce system and One-Stop Career Centers in meeting the needs of people with disabilities, including the expectation of full programmatic accessibility.

Former U.S. Senator Tom Harkin, D-Iowa, stated “It will help prepare a new generation of young people with disabilities to prepare for, to obtain and succeed in competitive, integrated employment, not substandard, subminimum wage, dead-end jobs, but jobs in which people with disabilities can learn and grow to their maximum potential. Basically, we’re going to give persons with disabilities the same supports and experiences that everyone else expects and receives which they haven’t had in the past.”

U.S. Congressman Pete Sessions, R-Texas, also heralded the legislation. “As the father of a young man with Down syndrome, I understand the importance of providing individuals with disabilities opportunities in the workplace. The Workforce Innovation and Opportunity Act will advance employment options for these individuals and give them the opportunity to receive the training necessary to succeed in today’s economy. I proudly joined my colleagues in the House in supporting this job-creating legislation and will continue to support the development and advancement of individuals with disabilities.”

PART I. CONCLUSION

Concerns about sheltered workshops, facility-based services and the use of sub-minimum wage are increasing.²² The emphasis on “Employment First”—that is, integrated employment as the first and preferred option for all people with disabilities – is gaining significant momentum nationally. The U.S. Department of Labor – Office of Disability Employment Policy has established a national technical assistance and mentoring program to support Employment First systems change in states across the country. Currently:

- Thirty-two states have an official Employment First policy, either in the form of legislation, policy directive, or Executive Order.²³
- Only four states have no Employment First efforts or initiatives underway.²⁴

Under Title II of the ADA and the Olmstead US Supreme Court decision, states must ensure they are not, by virtue of their policies, program design and funding structures, contributing to the unnecessary segregation of individuals with disabilities. If program and funding structures do not support and indeed favor integrated service provision, states may open themselves up to legal liabilities.

As states design and implement changes to their HCBS programs, bringing about an ultimate change in outcomes for HCBS participants is the primary goal. States are recognizing that change must be effected at multiple levels and front-line implementers of the state’s programs and policies must be educated, trained, mentored and supported to make policy change real for individual HCBS participants. Front-line implementers include, most notably, case managers and service providers. A systems change that overlooks the importance of these two groups will likely fall short of achieving its goals.

LINKS TO KEY PRIMARY SOURCES

Text of the April 2014 Consent Decree between Rhode Island and the Department of Justice:

<http://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>

Information on Department of Justice Olmstead enforcement actions:

www.ada.gov/olmstead

²² The National Council on Disabilities’ report “Subminimum Wage and Supported Employment” (Aug. 2012) and the National Disability Rights Network’s “Beyond Segregated and Exploited” (April 2012) both advocated for the elimination of 14(c) and increased integrated community employment.

²³ <http://www.apse.org/employment-first/map/>

²⁴ Ibid.

Centers for Medicare and Medicaid Services resources on the new Home and Community Based Settings Rule (includes links to the final regulation, fact sheets, and the tool kit for residential settings):

<http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

Part II. A Profile of Maine

A. A Summary of Maine's High-Level Employment Data

As of 2013, 9.4% of state's working-age population (16-64) has a disability. 32% of this group is employed, just under the national average of 33.6%. Among working-age people with any kind of cognitive disability, 22% are employed, again just under the national average of 23.4%. In contrast, 77% of working-age people without disabilities in Maine are employed, which is 5% more than the national average of 72%.²⁵

Maine's Developmental Disabilities agency reported 28% of the 3,515 people with IDD receiving HCBS day/employment services in FY 2013 were receiving supported employment services. This is 9% higher than the national average for FY2013, with Maine outpacing 36 other states.

The employment rate of mental health consumers in Maine (as a percentage of those in the labor force across all age group demographics) averages 9% less than US figures. Maine's Substance Abuse and Mental Health Services agency reports that Maine serves roughly 19,000 people each year in case management type services (e.g. "Community Integration/Rehabilitation Services; Assertive Community Treatment). The employment rate of this group of mental health consumers is 8.8%

²⁵ Source: StateData: The National Report on Employment Services and Outcomes (Winter 2014) which can be found at: https://www.statedata.info/sites/statedata.info/files/files/statedatabook_2015_F.pdf

Outcomes Domain: Employment Status of Adult Mental Health Consumers Served in the Community by Age and Gender, FY 2012

Maine

Demographics	State				Employed as Percent of those in Labor Force		Employed as Percent of Known Employment Status		States Reporting
	Employed	Unemployed	In Labor Force*	With Known Employment Status**	State	US	State	US	
Age 18 to 20	65	204	269	483	24%	30%	13.5%	12.0%	57
Age 21 to 64	777	2,270	3,047	10,328	26%	34%	7.5%	17.9%	58
Age 65 and over	12	38	50	681	24%	32%	1.8%	9.8%	58
Age Not Available	-	1	1	3	0%	31%	0.0%	5.7%	12
Age TOTAL	854	2,513	3,367	11,495	25%	34%	7.4%	16.9%	58
Female	474	1,281	1,755	6,462	27%	35%	7.3%	17.2%	58
Male	351	1,152	1,503	4,584	23%	32%	7.7%	16.5%	58
Gender Not Available	29	80	109	449	27%	42%	6.5%	21.1%	27
Gender TOTAL	854	2,513	3,367	11,495	25%	34%	7.4%	16.9%	58

Currently, tracking of integrated employment or supported employment participation rates among people with other types of disabilities (e.g. traumatic brain injury; physical disability and others) receiving HCBS is not done by DHHS. The state has yet to develop a cross-system, longitudinal tracking system that can tracking employment services, investments and outcomes for each person with a disability who makes use of one or more of the publicly funded programs that can assist with competitive integrated employment. Compatibility between different state agency data systems is one of the issues; however the effectiveness and cost-effectiveness of state investments and services could be much more accurately assessed if such a data system were in place. This could be the key to securing support for additional investment in competitive integrated employment services and outcomes among taxpayers and members of the state legislature.

B. Maine’s HCBS Programs

Maine operates a number of HCBS programs that include employment and day services for various populations of transition-age youth and adults with disabilities who qualify for these programs. Following is a list of the active HCBS waivers with details on who they serve and the services that are included. While some of these waivers provide access to employment-focused services that support competitive integrated employment (career planning; work support-individual; employment specialist services), this is not the case across all of the waivers. Most notably, individuals with physical disabilities served on the Section 19 waiver and transition-age youth with ID or autism do not currently have access to employment-focused services that can support competitive integrated employment.

ME Elderly and Adults with Disabilities (0276.R04.00)

Provides adult day health, care coordination, personal care, respite, FMS, skills training, supports brokerage, environmental mods, home health services, homemaker, PERS, self-directed personal care & transportation for aged 65 - no max age and physically disabled 18-64

ME Services for Children w/ID and/or Pervasive Developmental Disorders (0864.R00.00)

Provides home support, respite, communication aids, consultation, home accessibility adaptations, transportation for individuals w/autism, IID ages 5 – 21

ME Consumer Directed Personal Assistance Services (0127.R05.00)

Provides personal attendant, supports brokerage, FMS, skills training, PERS for aged individuals 65 - no max age, physically disabled ages 18-0

ME Home & Community Services for Adults w/ID or Autistic Disorder (0159.R05.00)

Provides community support, home support (1/4 hr.), per diem home support, work support-group, adult foster care/shared living, assistive technology, career planning, communication aids, consultation, counseling, crisis assessment, crisis intervention, employment specialist services, home accessibility adaptations, home support-remote support, home support-residential hab-family centered support, non-traditional communication consultation, non-medical transportation, non-traditional communication assessment, OT (maintenance), PT, (maintenance), specialized medical equipment and supplies, speech therapy (maintenance), work support-individual and work supports-small group for individuals w/autism, IID ages 18 - no max age

ME Support Services for Adults w/ID or Autistic Disorder (0467.R01.00)

Provides community support, home support 1/4 hr, respite, work support-group, assistive technology, career planning, employment specialist services, home accessibility adaptations, home support remote support, transportation, work support-individual and work supports-small group for individuals w/autism and ID ages 18 - no max age.

ME HCBS for Adults w/Other Related Conditions (0995.R00.00)

Provides care coordination, community support, home support (1/4 hr), home support-per diem, personal care, work support-individual, assistive technology, communication aids, consultation and assessment, employment specialist services, home accessibility adaptations, home support-remote support, non-traditional communication consultation,

non-medical transportation, non-traditional communication assessments, OT (maintenance), PT (maintenance), specialized medical equipment and supplies, speech therapy (maintenance) for aged individuals ages 65 - no max age and other disabilities ages 21-64

ME HCBS for Member with BI (1082.R00.00)

Provides care coordination, career planning, home support-1/4 hr-level I, home support-per diem level II, community/work reintegration-group 97537 HQ U9, self care/home management reintegration group 97535 HQ U9, self care/home management reintegration-individual 97535 U9, assistive technology, community/work reintegration-individual 97537, employment specialist services, home support-remote support, home support-per diem level III increased neurobehavioral, non-medical transportation, work ordered day club house, work support-individual for individuals w/SED ages 18 - no max age.

While the state's Rehabilitation service option under the Medicaid State Plan does permit the provision of "supports to maintain competitive integrated employment" under the Community Support component of the Rehabilitation option, this option is severely underutilized (only 4 people per year on average) for three reasons:

1. There are unrelated issues being resolved with CMS regarding the Rehabilitation option. This is a short-term barrier.
2. Unlike many states implementing evidence-based supported employment (Individual Placement and Support), Maine state officials believe that CMS policy strictly prohibits the billing of supported employment under the Rehabilitation option (Community Support is a sub-category under the State Plan Rehabilitation option). As a result, Job Development and job coaching are completely prohibited but the state has issued guidance that helping individuals address psychiatric symptoms, when these create barriers to maintaining employment, is billable. In addition to severely limiting the provision of IPS, current policy does not provide enough detail to cause providers to be comfortable with billing this coverable part of the evidence-based model under the state plan Rehabilitation option.

C. Maine's Historic Commitment to Competitive Integrated Employment

Maine was one of the first states whose legislature implemented policy change (Public Law 101) to end public funding for sheltered work and focus its employment supports for people with IDD on supported employment.

As a complementary service, Maine added Community Supports to its HCBS waivers for adults with ID and traumatic brain injuries. While intended to foster integrated community-based supports, this category of service has a large investment in facility-based service models.

Maine also uses state funding to support competitive integrated employment even when no federal match is available.

- Maine VR has a set-aside fund that is state-only dollars and which can be used to provide supported employment job coaching services to individuals with disabilities who don't have access to these services from any other program, although this fund has not been increased in the last eight years. The current funding does however also help Maine VR draw down federal match at a rate of 80% for other competitive integrated employment services that the agency provides.
- The state currently funds seven Employment Specialists for individuals with mental illness using state-only dollars. While this ensures access to the services without imposing income limits, it does not allow the state to capture federal match.
- The state, through VR, currently funds employment services for individuals with Traumatic Brain Injury through a fund that is strictly state general purpose revenue.

Maine also established a Medicaid Buy-In. At this point, it appears enrollments are not increasing. There is concern that outreach and education of people who could use the Medicaid Buy-In is no longer occurring. There is also a concern that there may be certain aspects of the program that create a disincentive for using it.

D. Maine's Contemporary Commitment to Employment First

There appears to be very strong commitment to competitive integrated employment across agencies and at the Commissioner level of each agency. This has sustained itself for multiple years.

There is good alignment of goals and expectations between Medicaid/HCBS programs and the Maine VR program. Policies supporting these shared goals and expectations are in process of being developed – a number are in place but the work is not yet fully complete.

With regard to the Maine Department of Education, despite the challenges associated with local control of the school system, there are pockets of very good transition practices occurring and a significant level of willingness on the part of the DOE to work with partner agencies and raise expectations among students, families and schools regarding transition goals and outcomes being appropriately focused on competitive integrated employment. Near term efforts are anticipated to include aligning transition planning policies and processes with the Employment First Maine Act, ensuring that competitive integrated employment is the first employment service option that is offered by schools, prior to the offer of other supports or services

There is also strong commitment to maintaining the same accreditation standards for supported employment services across Medicaid HCBS programs, state-funded long-term supported employment services and Maine VR, and to this end, there is strong collaboration on training and technical assistance to accredited providers. Since 2000, Maine has required certification of Employment Specialists under Medicaid HCBS, state-funded long-term supported employment services and Maine VR. Since 2007-08, both agencies have required accreditation/certification of direct support professionals delivering work support services under the Section 21 and 29 waivers through the College of Direct Support

Maine’s legislature passed the Employment First Maine Act into law in June of 2013, establishing integrated community-based employment and customized employment as the “first and preferred service or support option” for people with disabilities. The passage of the law as a natural progression in Maine’s focus on competitive integrated employment as a valued outcome for the state’s citizens with disabilities. The state, like many that have passed Employment First laws, is now grappling with what it means to be fully compliant with the law. While there is no question that competitive integrated employment is valued in Maine, the law requires two critical things from state agencies:

- It requires all state agencies, in carrying out their duties to provide services and supports to persons with disabilities, to include as a core component of its services and supports the opportunity for persons with disabilities to acquire integrated community-based employment or customized employment. [§3303. State agencies; requirements)
- It requires that when providing services or supports to a person with a disability, a state agency shall offer to the person, as the first and preferred service or support option, a choice of employment services that will support the acquisition by the person of integrated community-based employment or customized employment. [§3303. State agencies; requirements)

The "first and preferred service or support option" means the first employment service option that is offered by a state agency, prior to the offer of other supports or services, including day services.” [Source: Employment First Maine Act] Achieving these expectations in practice challenges Maine to push forward with more systems changes that prioritize and assure access to competitive integrated employment services and supports, rather than resting on the well-deserved laurels that cause the state to rank ahead of many others at the present time.

E. How Maine is Currently Using HCBS as a Tool to Advance Employment

While Maine is above the national average in the percentage of individuals with IDD who are working in competitive integrated employment, other disability populations with access to HCBS appear to be working in competitive integrated employment at much lower rates. As well, across all of the HCBS working-age disability populations, there continues to

be greater reliance on non-work services (e.g. community support; adult day health; clubhouse; etc.) than work services. Within the non-work services category, there is also a concern that the bulk of the services being provided are facility or site-based. Further, within the category of supported employment services, Maine also uses some of its 1915c waivers to fund work-supports group (small group supported employment), which involves use of subminimum wage and the Medicaid service provider acting as the employer of record. Not only does this type of supported employment fail to maximize people's earning potential; but it also creates a conflict of interest for the Medicaid provider, and is likely to inhibit free choice of provider as required under Medicaid. When a person's employer is also their service provider, it is hard for the person to exercise their right to choose a different provider without jeopardizing their continued employment.

There is also strong commitment to maintaining the same accreditation standards for supported employment services across Medicaid HCBS programs and Maine VR, and to this end, there is strong collaboration on training and technical assistance to accredited providers. However, more provider capacity is needed to further the state's Employment First goals and to accomplish meaningful growth in the competitive integrated employment rate among working-age people with disabilities.

Most notable however, is the fact that the state's current HCBS investment in competitive integrated employment is still significantly overshadowed by investment in non-work services (e.g. community support, adult day health, clubhouse services) and much of this investment in non-work services is still in facility-based models of services. Since the nature of the services authorized and purchased under HCBS programs is tied directly to individual service planning processes, it appears that the planning processes being used may not be adequately educating and encouraging HCBS participants on the opportunities and benefits associated with pursuing competitive integrated employment. Further, the planning processes may not yet be fully aligned with the Employment First Maine Act, ensuring that competitive integrated employment is the first employment service option that is offered by a state agency, prior to the offer of other supports or services, including day services. The continued disproportionately high utilization of facility-based non-work (day) services creates potential issues with regard to the state's compliance with the federal HCB settings rule. The rule requires that setting do not isolate HCBS recipients from the broader community of people not receiving HCBS and such facility-based models of service and settings create an increased likelihood of this isolation.

F. Recommendations for Enhancing Maine's Use of HCBS to Advance the State's Employment First Goals

The Employment First Maine Act (§3303. State agencies; requirements) requires all state agencies, in carrying out their duties to provide services and supports to persons with disabilities, to include as a core component of its services and supports the opportunity for

persons with disabilities to acquire integrated community-based employment or customized employment. The Act further requires that “When providing services or supports to a person with a disability, a state agency shall offer to the person, as the first and preferred service or support option, a choice of employment services that will support the acquisition by the person of integrated community-based employment or customized employment.”

At this time, some persons with disabilities enrolled in HCBS programs do not have access to services and supports specifically designed to facilitate access to integrated community-based employment or customized employment. Further, it appears that individual service planning processes for HCBS programs do not fully operationalize the Employment First Maine Act, ensuring that a choice of employment services designed to facilitate integrated community-based employment or customized employment are offered first and promoted as preferred options by HCBS personnel. In order to address these gaps, it is recommended that the DHHS and Maine Care:

1. Ensure unfettered access to evidence-based competitive integrated employment services (including work incentives benefits counseling, career planning, Individual Placement & Support, Discovery and Customized Employment) for all HCBS enrollees with disabilities by establishing a 1915i State Plan Amendment that would offer these services to HCBS enrollees who currently do not have access to such services: people with physical disabilities, people with mental illness and people with other disabilities who are eligible for Medicaid State Plan services but who are not eligible for any of the HCBS waiver programs that otherwise include these employment services. In establishing the 1915i, the following is recommended:
 - a. Ensure Career Planning is available as a supplement to existing services so that people can explore employment and develop a plan to obtain employment without having to give up other services to do so.
 - b. Ensure anyone eligible for an HCBS 1915c waiver but on a waiting list for the waiver is automatically eligible for the 1915i program. Access to employment has the potential to prevent, or at minimum reduce, the need for more expansive and expensive services under an HCBS waiver.
 - c. Ensure the supported employment benefit is available to all 1915i eligible populations who could benefit from these services. Do not limit supported employment only to individuals with mental health disabilities. CMS clarified in 2011 that supported employment may be offered to any target group for whom the provision of these services would be beneficial in helping them to realize their goals of obtaining and maintaining community employment in the most integrated setting. The provision of these services is not limited to certain waiver participants and can be a meaningful addition to the service array for any of the regulatorily identified target groups. [September 16, 2011 CMS Informational Bulletin]
If Psycho-Social Clubhouse services are included in the 1915i for individuals

with mental health disabilities, these should be available as supplement – rather than an alternative- to the competitive integrated employment services available under the 1915i. Eligibility for Clubhouse services should be tied to 1915i enrollees also receiving services to obtain or maintain competitive integrated employment. Additionally, any transitional employment provided by Clubhouses should continue to be time-limited. The Clubhouse setting will be required to meet all of the HCB setting standards.

2. Add Career Planning service to 1915c waivers that serve working-age adults but do not currently include this service. Pursue CMS approval for pending amendment to add career planning to the 1915c waiver serving people with Other Related Conditions (ORC). Ensure Career Planning facilitates access to work incentives counseling (C-WIC) services and leads to maximization of PASS, IRWE and Ticket to Work options.
3. Issue guidance clarifying what non-employment services in each of the 1915c waivers and the State Plan can be used to support participation in competitive integrated employment (e.g. personal care; assistive technology; assistive technology assessment, etc.)
4. Review and update all state HCBS policies pertaining to person-centered individual service planning (including policies pertaining to initial assessments which inform individual service planning) to ensure the requirements of the Employment First Maine Act are operationalized in all HCBS programs. Provide guidance and training for the field regarding policy changes and how these should impact HCBS assessment and service planning practices.
5. Continue and expand commitment to strategic rate setting across all HCBS programs to ensure that on balance, financial incentives to providers - for providing competitive integrated employment services - are clearly present and any inadvertent incentives to provide non-work services in lieu of competitive integrated employment services are addressed. It is important to note that inadvertent incentives to prioritize non-work services over competitive integrated employment services may exist, even if the published rates for non-work services are lower than the published rates for competitive integrated employment services. Other factors, including staffing ratios and cost to provide services must be factored into rate setting in order to ensure clear incentives to provide competitive integrated employment services are present. Further, there are a number of compelling rationales for moving away from fee-for-service reimbursement for employment services and instead adopting carefully designed outcome-based reimbursement models. Recent and pending guidance from CMS confirms that states may adopt such approaches in order to incentivize the cost-effective

provision of best practice approaches to supported employment and other employment services that support competitive integrated employment participation. It is recommended the state explore options for outcome-based reimbursement and engage providers in considering the potential advantages of moving to such an approach.

6. With regard to State General Funds currently funding Employment Specialists for Mental Health: Consider whether these funds could be used for the 1915i in order to leverage federal match (62.67% FMAP rate) and increase the amount of funding available for 1915i services by roughly \$1.67 cents for every dollar of state funds. In doing this, the state should make every effort to remove any disincentives to engage in competitive integrated employment that yields meaningful income. The state should consider no less than 300% of federal poverty level as maximum income for eligibility for 1915i services. This will not only incentives people to engage in meaningful levels of work that can help them achieve economic self-sufficiency; but it will also enable them to obtain work that offers employer-sponsored health care as a benefit. (See also recommendation #8 – Medicaid Buy-In Program)
7. With regard to State General Funds currently allocated to services for individuals with traumatic brain injuries: Consider whether all or part of this state-only funding could be integrated into the 1915i (including individuals with traumatic brain injuries in its eligible populations) to leverage federal match (62.67% FMAP rate) and increase the amount of funding available for services by roughly \$1.67 cents for every dollar of state funds.
8. With regard to Maine’s Medicaid Buy-In Program: Individuals enrolled in the 1915i or any of the 1915c HCBS waiver programs should be able to keep access to their services if they earn substantial income through competitive integrated employment. It is essential that the Medicaid Buy-In program be available for individuals on all of these HCBS programs, if employer-sponsored healthcare is not available or the coverage is not sufficient to ensure on-going access to needed long-term support services necessary to maintain competitive integrated employment and access to community living. It is recommended that the state evaluate the Medicaid Buy-In Program and determine if any changes are needed to enhance its effectiveness as a work incentive for individuals on Medicaid. At minimum, it seems important to develop a new strategy for promoting the Medicaid Buy-In Program as part of the state’s overall Employment First efforts.
9. To further ensure full access to competitive integrated employment and to maximize opportunities for community inclusion and independence, the State’s Olmstead Plan should address the provision of transportation supports where individuals with disabilities wish to access competitive integrated employment or other community resources and such community participation does not require the

delivery of a publicly funded services. As part of the state's commitment to implementing the Olmstead decision, while also safeguarding against unnecessary provision of services, the state should ensure that transportation supports are available for individuals with disabilities to independently access employment and other community resources and opportunities. This includes transportation supports to allow people to independently access VR, Career Centers and C-WIC services.

10. There is good alignment of goals and expectations between Medicaid/HCBS programs and the Maine VR program. Policies supporting these shared goals and expectations are in process of being developed – a number are in place but the work is not yet fully complete. This work should be finished and then on-going monitoring to ensure any new policies or policy changes/clarifications are implemented as needed. Continuing with joint reviews of providers used by both agencies is recommended to ensure consistent communication of expectations to providers.
11. Develop a thoughtful and comprehensive multi-year plan to facilitate access to competitive integrated employment for the small number (200-250) of individuals in Maine who are employed by their Medicaid service provider and paid at subminimum wage. In developing the plan, explore: (a) data available through the state's Wage and Hour Division; (b) recommendations in the Interim Report of the US Department of Labor's Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities; (c) lessons learned and impact of legislation in New Hampshire; and (d) key provisions in the Workforce Innovation and Opportunity Act impacting the on-going use of subminimum wage.
12. Begin tracking of the integrated employment status of all people with other disabilities (e.g. traumatic brain injury; physical disability and other related conditions) receiving HCBS.
13. Develop a cross-agency workgroup to recommend the design for a cross-system, longitudinal tracking system that can effectively track employment services, investments and outcomes for each person with a disability who makes use of one or more of the publicly funded programs that can assist with competitive integrated employment. Address how to resolve compatibility issues between different state agency data systems, and facilitate merging of multiple agencies' data into a single data warehouse. Define the types of reports that could be produced for the governor, legislature, general public and other interested parties outlining the return on investment the state is achieving with competitive integrated employment services and supports. Define how the data could be used for on-going performance improvement to further bolster the state's competitive integrated employment participation rate among Maine residents with disabilities.

Recommendations for State Agency Partners to DHHS and Maine Care:

1. The Maine Department of Education (DOE) should participate as a full partner in implementing and operationalizing the Maine Employment First Act and relevant provisions of the Workforce Innovation and Opportunity Act (WIOA). The DOE should adopt a clear focus on preparing students with disabilities for competitive integrated employment and/or post-secondary education after high school. In ensuring Indicator 13 compliance, the DOE should clearly define post-secondary employment outcomes and eliminate outcomes that are not gainful employment (e.g. homemaker; volunteering; subminimum wage employment; segregated employment or training) from the list of permissible outcomes.
2. The Maine Division of Vocational Rehabilitation (VR) should collaborate with DHHS to increase the number and capacity of providers who are certified as both Medicaid HCBS and VR providers. Capacity building for all providers should be addressed and increased collaboration between VR and DHHS is essential as additional services are added into the 1915i
3. The Maine Department of Labor should consider, given the new requirements of state VR agencies under WIOA, proposing an increase in VR set-aside fund which can be used to provide extended supported employment job coaching services to individuals with disabilities who don't have access to these services from any other program after VR has exhausted its ability to use federally matched funding. While the amount of service available to an eligible individual is modest but sufficient, there is a need for additional funding to ensure that everyone who need this service to maintain competitive integrated employment can receive this service.
4. The Maine Department of Labor should, in light of new expectations in WIOA, utilize the experience and knowledge of its partners at DHHS and VR to consider how the workforce system can embed Customized Employment into Maine's workforce system policies and practices.